



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

IN THE MATTER OF CLAIM AGAINST THE
DEALER BOND OF BIG BEND MOTORS, INC.

Case No. TR-01-0021

FINAL DECISION

This is a final decision on the claim of Ms. Michelle Borrmann dated May 2, 2000, with the Wisconsin Department of Transportation (the "Department") against the motor vehicle dealer bond of Big Bend Motors, Inc. (the "Dealer"). On April 20, 2001, the claim, along with the documents gathered by the Department in its investigation, was referred to the Division of Hearings and Appeals for hearing. The undersigned initially gave the parties until June 4, 2001, to file any additional information they wished to have considered in issuing a preliminary determination in the matter. The letter sent to the Dealer's address at South 91 W22945 Milwaukee Avenue in Big Bend, however, was returned to the undersigned as not deliverable. The undersigned then re-transmitted the material to Mr. Wayne Bushberger, a principal of the Dealer, at the address shown below, and allowed all parties until June 15, 2001 to file any additional information. None of the parties submitted any additional information.

The undersigned later determined that it would be appropriate to treat the matter as a request for a declaratory ruling under Wis. Admin. Code § Trans 140.26(a). A public notice was published in the Muskego Sun newspaper on July 24, 2001, notifying the public that any claims for money damages for an act of the Dealer during the period covered by the bond should be filed by September 10, 2001. No additional claims were filed.

Pursuant to due notice, a contested case hearing on the claim was held in Milwaukee on November 7, 2001. Ms. Borrmann appeared and represented herself, and Mr. Wayne Bushberger appeared and represented the Dealer. No representative Capital Indemnity Corporation appeared. Ms. Borrmann testified and also presented the testimony of her husband. Mr. Bushberger testified on behalf of the Dealer. Exhibits 1, 2 and 3 were marked and received in evidence.

The parties to this proceeding are certified as follows:

Ms. Michelle Borrmann
2766 S. 50th Street
Milwaukee, Wisconsin 53219

Capitol Indemnity Corporation
P.O. Box 5900
Madison, Wisconsin 53705-0900

Big Bend Motors, Inc.
c/o Mr. Wayne Bushberger
S74 W14235 Settleway
Muskego, Wisconsin 53150

FINDINGS OF FACT

1. Big Bend Motors, Inc. (the "Dealer") is a motor vehicle dealer that was licensed by the Department pursuant to Wis. Stat. § 218.0111 (1999-2000) from at least November 23, 1993 through at least February 7, 2000. The Dealer's facilities were located at S91 W22945 Milwaukee Avenue in Big Bend, Wisconsin.
2. The Dealer had a surety bond in place from January 1, 1994 to February 7, 2000 from Capitol Indemnity Corporation. The bond number in effect from December 1999 through February 10, 2000 was bond number LP 579425.
3. By December 1999, the Dealer was in the process of closing its business at S91 W22945 Milwaukee Avenue in Big Bend, Wisconsin, and its telephone had been disconnected. In November 1999, Mr. Wayne Bushberger, the principal operator of the Dealer, informed personnel at the Department that he was in the process of selling the business. The Dealer never informed the Department that it was changing the place of its business or opening a new place of business as would be required by Wis. Stat. § 218.0119.
4. Ms. Michelle Borrmann and her husband became aware that the Dealer had a van for sale in which they might be interested. On January 18, 2000, they telephoned Mr. Bushberger at a tavern in Muskego known as Bushy's. Bushy's is located about five miles from the business location of the Dealer. Mr. Bushberger has a proprietary interest in Bushy's. The Borrmann's arranged to meet with Mr. Bushberger at Bushy's to look at the van, arriving late in the afternoon. Mr. Bushberger had the engine running because of the cold. Mr. Bushberger allowed the Borrmann's to take the van on a test drive from Bushy's.
5. On January 18, 2000, at 5:31 p.m., Ms. Borrmann signed a sales contract form regarding the 1991 GMC conversion van ("Van"), VIN 1GDEG25K2M7510933, for \$5,250.00 plus taxes and fees for a total price of \$5,615.00. Big Bend Motors was the nominal seller, with an address of S91 W22945 Milwaukee Avenue in Big Bend. The Dealer intended this form to provide to Ms. Borrmann the option to purchase the Van on the terms stated therein no later than 5:30 p.m. the next day, January 19, 2000, as indicated by Bushberger's handwritten notation under the "Other Conditions of Sale" section as follows: "This is only good intill [sic] 1-19-00 530 pm".

6. On January 19, 2000, Mr. Borrmann telephoned Mr. Bushberger at Bushy's to inform Bushberger that the Borrmann's wished to purchase the Van on the terms reflected on the sales contract form that had been signed the day before, and Bushberger confirmed the deal. The Van was sold "As Is", with no warranties, expressed or implied.
7. On January 20, 2000, the Borrmann's obtained financing from a bank and then at 5:30 p.m. they went to Bushy's to meet Bushberger and take delivery on the Van. Bushberger completed the "Wisconsin Title and License Application" for the Van, reflecting "Big Bend Motors", dealer number 2854, in the section captioned "Licensed Dealers' Statement of Sale and Warranty." The Borrmann's gave Bushberger \$1,954.00 in cash and the balance of \$3,661.00 by a check made out to Big Bend Motors.
8. Bushy's was not the Dealer's "regular place of business" as that term is employed in Wis. Stat. § 423.201(1). The Dealer had not notified the Department that it was changing the location of its place of business from the Milwaukee Avenue address, as required by Wis. Stat. § 218.0119. The Department never issued an amended license to the Dealer authorizing it to operate from the any business location other than the Milwaukee Avenue address.
9. Bushberger's act on January 18, 2000 of offering to sell the Van to Borrmann's while the Borrmann's were at Bushy's amounted to the initiation of a face-to-face solicitation away from the Dealer's regular place of business as contemplated by Wis. Stat. § 423.201(1)(a).
10. The consummation of the sale at Bushy's on January 20, 2000 occurred away from the Dealer's regular place of business as contemplated by Wis. Stat. § 423.201(1)(b).
11. The sale of the Van was a "consumer approval transaction" as defined by Wis. Stat. § 423.201(1) in that it (a) was initiated away from the Dealer's regular place of business, and (2) was consummated away from the Dealer's regular place of business.
12. The Dealer did not inform the Borrmann's orally or in writing at any time that they had the right to cancel the transaction until midnight of the third business day after having been given such notice under the procedure specified by Wis. Stat. § 423.202(1). Bushberger did, however, advise the Borrmann's to contact him if any problems surfaced in the next week.
13. On January 23, 2000, a puff of blue smoke came out the Van's exhaust, and the engine stopped running altogether. On January 24, 2000, the Borrmann's had the Van towed to a service station, which identified the following problems: "motor is seized up", "crankshaft does not turn", "seized bearings – rods and mains". The service station determined that the Van "needs motor/rebuilding lower end". The Borrmann's informed the Dealer of the problem by leaving messages for Bushberger, but as of February 2, 2000, Bushberger had not responded.
14. On January 28, 2000, Ms. Borrmann filed a Dealer Complaint with the Department regarding the Van, requesting that either the sale be rescinded or that the Dealer repair the Van. The Dealer rejected Borrmann's request to rescind the transaction. The Dealer did not make any proposal to repair the Vehicle that either would not have involved an additional expense to Borrmann or that caused Borrmann reasonably to believe would be performed by qualified mechanics.

15. On or about April 27, 2000, Ms. Borrmann had the engine replaced at a total cost of \$3,314.55.
16. On May 2, 2000, Ms. Borrmann filed a claim against the Dealer's bond for the amount of repairs. She also claimed reimbursement in the amount of \$128.08 for interest expenses for February-April 2000 "when van was sitting undrivable". Lastly, she sought compensation for a \$25 registration reinstatement fee that she had paid to the Department because she had been unable to have the emissions testing completed by March 17, 2000 because the Van was not running.
17. If the Dealer had duly notified Ms. Borrmann that she had the right to cancel the sale by midnight of the third business day after the sale had been consummated, Ms. Borrmann would have timely exercised that right and the sale would have been canceled. The cancellation would have resulted in Ms. Borrmann sustaining no losses from the cancelled transaction.
18. After the Dealer rejected Ms. Borrmann's request to rescind the transaction, Ms. Borrmann acted reasonably in rejecting the Dealer's proposed repairs and having the Van repaired herself. She would not have been required to repair the Van if the Dealer had cancelled the transaction as she had requested in her Dealer Complaint of January 28, 2000. Ms. Borrmann suffered an actual loss as a result of the Dealer's failure to cancel the sale in the amount of repairs to the Van of \$3,314.55.
19. Ms. Borrmann also suffered an actual loss as a result of the Dealer's refusal to cancel the transaction in the sum of \$25, which was the fee for reinstatement of her registration that she was required to pay to the Department because she had been unable to have the Van tested for emissions by March 17, 2000.
20. The interest cost of \$128.08 claimed by Ms. Borrmann is not recoverable on a claim against a dealer bond. All claims for interest are expressly disallowed under Wis. Admin. Code § Trans 140.21(2)(e).
21. Ms. Borrmann's bond claim was filed within three years of the ending date of the period the Capitol Indemnity bond was in effect and thus the claim is timely.

DISCUSSION

The procedure for determining claims against dealer bonds is set forth in the Wisconsin Administrative Code at Chapter Trans 140, Subchapter II. Section Trans 140.21(1) provides in relevant part as follows:

A claim is an allowable claim if it satisfies each of the following requirements and is not excluded by sub. (2) or (3):

(a) The claim shall be for monetary damages in the amount of an actual loss suffered by the claimant.

(b) The claim arose during the period covered by the security.

(c) The claimant's loss shall be caused by an act of the licensee, or the [licensee's] agents or employees, which is grounds for suspension or revocation of any of the following:

1. A salesperson license or a motor vehicle dealer license, in the case of a secured salesperson or motor vehicle dealer, pursuant to s. 218.01(3)(a)1. to 14., 18. to 21., 25. or 27. to 31., Stats. *[recodified as §§ 218.0116(1)(a) to (gm), (im) to (k), (m), and (n) to (p) in Wis. Stats. (1999-2000)]*.

* * * *

(d) The claim must be made within 3 years of the last day of the period covered by the security. The department shall not approve or accept any surety bond or letter of credit which provides for a lesser period of protection.

Accordingly, to allow a claim, a finding must be made that the Dealer violated one of the sections of § 218.0116(1), Stats., identified in Wis. Adm. Code § Trans 140.21(1)(c)1, and that the violation caused the loss claimed.

Wis. Admin. Code § Trans 140.21(1)(c)1 provides that a violation of Wis. Stat. § 218.0116(1)(gm) will support a claim against a dealer bond. Section 218.0116(1)(gm) provides as follows:

(1) A license may be denied, suspended or revoked on the following grounds: ...

(gm) Having violated any law relating to the sale, lease, distribution or financing of motor vehicles.

Wis. Stat. § 218.0142(10) is a statute respecting the sale of motor vehicles. It provides as follows:

All transactions which constitute consumer transactions (s. 421.301(13)) are subject to chs. 421 to 427, in addition to ss. 218.0101 to 218.0163.

The sale of the Van constituted a "consumer transaction" as defined in Wis. Stat. § 421.301(13).

Chapter 423, Stats., "Consumer Approval Transactions and Other Consumer Rights", is made expressly applicable to sales of motor vehicles by Wis. Stat. § 218.0142(10). Section 423.201(1) defines a "consumer approval transaction" as follows:

"Consumer approval transaction" means a consumer transaction other than a sale or lease or listing for sale of real property or a sale of goods at auction that:

(a) Is initiated by face-to-face solicitation away from a regular place of business of the merchant or by mail or telephone solicitation directed to the particular customer and

(b) Is consummated or in which the customer's offer to contract or other writing evidencing the transaction is received by the merchant away from a regular place of business of the merchant and involves the extension of

credit or is a cash transaction in which the amount the customer pays exceeds \$25.

The sale of the Van constituted a “consumer approval transaction”. Bushberger’s offer to sell the Van to the Borrmann’s while the Borrmann’s were at Bushy’s tavern on January 18, 2000 meets the requirement of subparagraph (a) that the transaction be “initiated by face-to-face solicitation away from a regular place of business”. Subparagraph (b) is established because the contract was entered into and consummated at Bushy’s tavern on January 20, 2000, away from the Dealer’s regular place of business.

Wis. Stat. § 423.202(1) requires a merchant in a consumer approval transaction to give the customer written notice that the customer has the right to cancel the transaction until midnight of the third business day after having been provided such written notice. Section 423.203 prescribes the form of the required written notice. The Dealer failed to provide Ms. Borrmann with the prescribed written notice, and failed as well to inform her in any fashion that she had a right of cancellation under Chapter 423, Stats.

The Dealer’s failure to provide Ms. Borrmann with the prescribed written notice of cancellation required by Wis. Stat. § 423.203 constitutes a violation of a law relating to the sale of a motor vehicle under Wis. Stat. § 218.0116(1)(gm) by operation of Wis. Stat. § 218.0142(10), which makes Chapter 423, Stats., expressly applicable to sales of motor vehicles that constitute a “consumer transaction”. The Dealer’s act constitutes an act for which a motor vehicle dealer license may be suspended or revoked under Wis. Stat. § 218.0116(1)(gm), and thus will support a claim against a dealer bond under Wis. Admin. Code § Trans 140.21(1)(c)1.

The violation caused an actual loss to Ms. Borrmann. If the Dealer had provided the required notice of cancellation, Ms. Borrmann would have exercised her right to cancel and would not have sustained a loss. The Dealer’s refusal to cancel the sale or otherwise offer to perform reasonable repairs to the Van caused Ms. Borrmann reasonably to spend \$3,314.55 to repair the Van so that it would be operable.

Ms. Borrmann also suffered an actual loss in the amount of the registration reinstatement fee of \$25 that she was required to pay because she was unable to have the Van undergo an emissions test before March 17, 2000 because it had stopped running.

The sums that Ms. Borrmann seeks for interest payments during the time that the Van was not operable are not recoverable in a claim against a dealer bond. Recovery of interest expense is expressly disallowed as damages in a claim under a dealer bond by Wis. Admin. Code § Trans 140.21(1)(e).

CONCLUSIONS OF LAW

1. Ms. Michelle D. Borrmann’s claim arose on January 20, 2000, the date she purchased the Van from the Dealer. The surety bond issued to Dealer by Capitol Indemnity Corporation was in effect at this time. The claim arose during the period covered by the surety bond.
2. The sale of the Van constituted a “consumer approval transaction” as that term is defined in Wis. Stat. § 423.201(1). The Dealer was therefore required to provide Ms. Borrmann with

written notice that she had the right to cancel the transaction in the fashion prescribed by Wis. Stat. § 423.203.

3. Ms. Borrmann filed a claim against the motor vehicle dealer bond of the Dealer on or about May 2, 2000. The bond claim was filed within three years of the last day of the period covered by the surety bond. The claim is timely filed pursuant to Wis. Adm. Code § Trans 140.21(1)(d).
4. The Dealer unreasonably rejected Ms. Borrmann's request to rescind the sale. Ms. Borrmann reasonably refused any repair suggested by the Dealer. Ms. Borrmann acted reasonably in having the Van repaired to restore it to operable condition after the Dealer refused to rescind the sale or to make a reasonable offer to repair it.
5. Ms. Borrmann suffered a loss of \$3,339.55 that was caused an act of the Dealer that would be grounds for the suspension or revocation of its motor vehicle dealer license. This amount is comprised of the cost to make reasonable repairs to the Van to restore it to operable condition in the amount of \$3,314.55, and the \$25 registration reinstatement fee. This part of the claim is allowable under Wis. Adm. Code § Trans 140.21(1)(c).
6. The claim for interest expense of \$128.08 may not be recovered in a claim on a dealer bond by the express exclusion of Wis. Admin. Code § Trans 140.21(2)(e).
7. The Division of Hearings and Appeals has authority to issue the following order.

ORDER

The claim filed by Ms. Michelle Borrmann against the motor vehicle dealer bond of Big Bend Motors, Inc. is **ALLOWED** to the extent of \$3,339.55. The claim for reimbursement of interest expense is **DENIED**. Capitol Indemnity Corporation shall pay Ms. Borrmann the amount of \$3,339.55 for her loss attributable to actions of Big Bend Motors, Inc.

Dated at Milwaukee, Wisconsin on November ____, 2001.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
819 N. 6th Street, Room 92
Milwaukee, Wisconsin 53203-1685
Telephone: (414) 227-1860
FAX: (414) 227-3818

By: _____

William S. Coleman, Jr.
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 & 227.53.
2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 & 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 & 227.53 to insure strict compliance with all its requirements.